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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Intellectual property rights and human rights

Report of the Secretary-General

Addendum

CONTENTS

		Page
Introduction		2
I.	REPLIES RECEIVED FROM GOVERNMENTS	2
A.	Guatemala	2
B.	Mexico	11
II.	REPLIES RECEIVED FROM INTERNATIONAL ORGANIZATIONS	13
	World Intellectual Property Organization	13
III.	REPLIES RECEIVED FROM NON-GOVERNMENTAL ORGANIZATIONS	15
A.	British Copyright Council	15
B.	Quaker United Nations Office/Friends World Committee for Consultation	17

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Introduction

The present report includes responses received after the submission of document E/CN.4/Sub.2/2001/12, from the Governments of Guatemala and Mexico, from the World Intellectual Property Organization, from the British Copyright Council and from the Quaker United Nations Office/Friends World Committee for Consultation.

I. REPLIES RECEIVED FROM GOVERNMENTS

A. Guatemala

[Original: Spanish]

1. This document is a compilation of national and international legislation in the area of intellectual property, copyright and related rights in the State of Guatemala, with emphasis on those activities that are considered to be positive developments by the State in guaranteeing the exercise of such rights. Most of the information was provided by the Intellectual Property Registry of Guatemala.

2. Part I of the document describes the constitutional regime governing copyright; part II industrial property rights. Part III deals with limitations of such rights and part IV, protection of traditional knowledge, indigenous cultural values, folklore and access to biological diversity.

I. Constitutional and legal regime governing intellectual property, copyright and related rights in Guatemala

3. The Constitution of the Republic of Guatemala recognizes and protects freedom of industry and business, as well as patent rights, as rights inherent in the human person, and guarantees their holders the enjoyment of exclusive ownership of their creations, in conformity with the law and international treaties to which Guatemala is a party. Article 41 of the Constitution defines property rights and article 42, copyright and patent rights. Article 46 establishes the primacy of international law over domestic law.

4. By Decree No. 33-98 of the Congress of the Republic, which was published in the Official Journal on 21 May 1998 and entered into force on 21 June 1998, the Law on Copyright and Related Rights was adopted; it is a legislative text in the public order and in the social interest designed to protect the rights of authors of literary and artistic works, performers, phonogram producers and broadcasting organizations. This text supersedes the previous legislation, Decree No. 1037 of the Congress of the Republic, adopted in 1954, which dealt only with copyright.

5. The Law is also based on Guatemala's international obligations as a party to the Berne Convention for the Protection of Literary and Artistic Works, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), all of which have been adopted and ratified by Guatemala.

6. Further legislation consists of the Central American Agreement for the protection of industrial property (adopted by Decree No. 26-73 of the Congress of the Republic), and the Patent Law on Inventions, Utility Models, Designs and Industrial Designs (Decree-Law No. 153-85). However, as such laws were not considered to respond adequately to changes due to developments in international trade and new technologies, the Industrial Property Law was enacted. It contains a series of norms effectively recognizing industrial property rights and protecting them in accordance with the requirements of today.

7. The need to revise earlier legislation in this field was also obvious in view of Guatemala's interest in strengthening protection of the intellectual property rights laid down in the Universal Declaration of Human Rights and in two provisions incorporated into the 1985 Constitution of the Republic concerning the protection of such rights: the first indicating that copyright is a fundamental human right and that those holding such rights enjoy exclusive ownership of their work in accordance with the law and international treaties (art. 42) and the second, that treaties and conventions ratified by Guatemala take precedence over internal law (art. 46). The incorporation of these two provisions into the Constitution, therefore, raised the need for the State to provide better and more effective protection of such rights, as a basic principle of social justice.

8. After the Law on Copyright and Related Rights had been in force for more than two years, experience with its implementation highlighted the need to expand, clarify and in some cases correct some of its provisions, not only to provide authors and right-holders with genuine and effective protection of such rights, but also to make the Law more responsive to current requirements imposed by the new technologies available for the dissemination of works. For this reason, the executive branch sponsored the adoption of a set of amendments to the Law; they are contained in Decree No. 56-2000 of the Congress of the Republic, which was adopted on 31 August 2000 and entered into force on 1 November 2000.

9. The above-mentioned Law grants authors a series of rights of a moral nature (right to be mentioned as author, right to ensure that the work is not altered or changed, etc.) and proprietary nature (right to authorize third parties to reproduce, distribute and market the protected work, communicate it to the public in any form whatsoever and make any use of it whatsoever); establishes exceptions to these rights (private copy, library copy, right of citation, etc.), fixes at 75 years the time limit for the protection of all categories of works with regard to property rights; establishes special provisions protecting computer programmes as literary works; includes a group of provisions governing audiovisual works and provides appropriate regulations for the different contracts covering such rights.

10. Principally, however, the reforms recently adopted by the Congress of the Republic will put into effect a new system of organization, operation and supervision of collective management societies; a series of detailed rules for injured parties to obtain provisional measures, including so-called border measures, through judicial channels; measures to apply oral proceedings, as governed by the Civil and Commercial Code of Procedure, to civil actions and the possibility, when the parties so agree, of submitting disputes to alternative dispute-resolution procedures, in conformity with the Arbitration Law currently in force.

11. In the area of criminal justice, the Law enables injured parties to associate themselves with criminal proceedings in the case of offences against copyrights and related rights, and also lays down an obligation for the Office of the Attorney-General of the Republic to establish a special unit with exclusive responsibility for the investigation and prosecution of offences against intellectual property rights.

II. Constitutional and legal regime governing industrial property rights in Guatemala

12. Like the rights of authors, the rights of inventors are recognized as being fundamental human rights by the Constitution of the Republic, which states that those holding such rights enjoy exclusive ownership of their invention in accordance with the law and international treaties (art. 42). Similarly, article 46 of the Constitution states that, in matters of human rights, treaties and conventions accepted and ratified by Guatemala take precedence over internal law. Mention should also be made of other fundamental provisions closely linked, directly or indirectly, with industrial property rights, stating, for example, that the economic and social system of the Republic is based on the principles of social justice (art. 118); that it is the fundamental duty of the State to promote the economic development of the Nation by stimulating enterprise in agriculture, livestock raising, industry, tourism and other activities, to protect consumers and users as regards preservation of the quality of domestic consumer products and export products and to create appropriate conditions for promoting the investment of domestic and foreign capital (art. 119 (a), (i) and (n)).

13. A joint effort which began in late 1999 involving the Ministry of the Economy, the Intellectual Property Registry, the World Intellectual Property Organization (WIPO), the Permanent Secretariat of the General Treaty on Central American Integration (SIECA) and representatives of various private sectors, focused on the adoption by the Congress of the Republic of a law governing intellectual property. The new law would bring together all provisions governing the acquisition, protection, entry into effect and cessation of rights over marks and other distinctive signs, inventions, utility models and industrial designs, would define and lay down regulations for the repression of unfair competition (including the protection of industrial or trade secrets) and would also establish procedures for implementing effective measures of protection against violations of industrial property rights.

14. That process culminated in the adoption on 31 August 2000 of the Industrial Property Law, Decree No. 57-2000 of the Congress of the Republic, which entered into force on 1 November 2000. The following are the main features of the Law:

In the area of marks and distinctive signs, it provides regulations protecting so-called well-known marks, a category that had previously not been adequately treated under Guatemalan legislation;

It provides for the possibility of registering three-dimensional marks and of requesting the cancellation of a domain name when it corresponds to a distinctive sign and its use may cause confusion or a risk of association in the mind of the consumer;
It provides regulations for registering collective marks and certification marks;

It provides for the possibility of opening a registry of appellations of origin, as a subdivision of geographical indications, but exclusively of appellations originating in Guatemala, ownership over which shall be assigned to the State, with the possibility for the administrating body, in which the Intellectual Property Registry participates, to authorize its use by third parties, in accordance with the specific rules and regulations to be adopted in each case;

In the area of patents, it makes provision, for the first time, for protection of plant varieties, pharmaceuticals and agricultural chemicals, previously excluded from this type of protection;

It establishes regulations for the protection of utility models and industrial designs;

It contains a group of provisions governing unfair competitive practices, in particular those relating to trade secrets and violations thereof, including undisclosed information and test data provided to the administrative authority for the purpose of obtaining medical licences prior to marketing pharmaceuticals and agricultural products;

In all categories of rights covered by the new Law, provision has been made for modern and expeditious registration procedures enabling applicants to obtain registration promptly;

The Law contains a series of regulations for the enforcement of industrial property rights which include the possibility for injured parties to obtain provisional measures, including so-called border measures; the establishment of oral proceedings for civil claims for compensation and the possibility, if the parties involved so agree, of submitting disputes to conflict-resolution procedures pursuant to the Arbitration Law;

In the area of criminal justice, the Law enables injured parties to associate themselves with criminal proceedings in the case of offences against intellectual property rights and lays down an obligation for the Office of the Attorney-General of the Republic to establish a special unit with exclusive responsibility in the area of intellectual property, similarly, the characterization in the Penal Code of offences against intellectual property rights is brought into line with the provisions of the Law.

III. Limitations of rights

15. As intellectual property rights, like all rights, are not absolute, the new Guatemalan legal regime provides exceptions for each category of rights, to permit an appropriate balance between the legitimate interests of holders and the vital interests of the community.

16. The Industrial Property Law provides explicitly for cases in which the exclusive rights granted to holders may not be invoked to challenge acts by third parties without prior authorization. Such cases are specified in the provisions below.

17. In the area of marks, the Industrial Property Law stipulates the following:

(a) The registration of a mark does not grant the right to prohibit a third person from using the following in relation to products or services legitimately placed on the market: (i) his name or address, or those of his trade establishments; (ii) indications or information about the characteristics of his products or services, including their quantity, quality, utilization, geographical origin or price and (iii) indications or information about availability, utilization, application or compatibility of his products or services, in particular with regard to spare parts or accessories. This limitation shall apply provided the product is used in good faith and there can be no confusion regarding the trade source of the products or services involved (art. 36);

(b) The registration of a mark does not give its holder the right to prevent the free movement of products that bear it legitimately and have been introduced into the market, in the country or abroad, by that holder or by another person having the holder's consent or economic ties with the holder, provided the products and any packaging that has come into immediate contact with them have undergone no modification or deterioration (art. 37);

(c) When the mark consists of a label or other sign composed of a series of names or graphic elements, protection will not include those names or graphic elements which are in general use or necessary in a trade context (art. 38).

18. In the area of patents, the Industrial Property Law stipulates the following:

(a) The following may not be protected by patents: (i) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; (ii) an invention whose use would be contrary to public order or morality, it being understood that such use will not be considered contrary to public order or morality solely because it is prohibited, limited or made subject to conditions by a legal or administrative provision and (iii) an invention whose commercial use is necessary to preserve the health of humans, animals, plants or the environment (art. 92);

(b) When the patent protects a plant, animal or other organism capable of reproduction, the holder may not prevent third parties from using that entity as an initial basis for obtaining new viable biological material and marketing the material thus obtained, except where repeated use of the patented material would be required in order to obtain such material (art. 129, para. 3);

(c) When the patent protects a plant or animal or its reproductive or multiplication material, the holder may not prevent the use of the product obtained from the protected plant or animal for subsequent reproduction or multiplication by a farmer or stockbreeders, and the marketing of that product for agricultural use or consumption, provided the product has been obtained on the farmer or stockbreeder's own holding and that the reproduction or multiplication is performed on the same holding (art. 129, para. 4);

(d) The patent shall not entitle the holder to prevent: (i) acts performed in the private sphere and for non-commercial purposes; (ii) acts performed exclusively for purposes of experimentation concerning the subject of the patented invention; (iii) acts performed

exclusively for purposes of teaching or scientific or academic research, for non-commercial purposes, concerning the subject of the patented research and (iv) acts referred to in article 5 ter of the Paris Convention for the Protection of Industrial Property (art. 130);

(e) The patent shall not give the right to prevent a third party from conducting trade negotiations concerning a product protected by the patent or obtained through a patented procedure, after that product has been placed on the market in any country by the holder of the patent or by another person having the consent of or economical ties with the holder (art. 131);

(f) When the patent protects biological material capable of reproduction, the patent shall not cover the material obtained through the multiplication or propagation of the material introduced into the market in accordance with paragraph 1, provided that the multiplication or propagation is a necessary result of the use of the material in conformity with the purposes for which it was introduced into the market, and that the material deriving from such use is not used for purposes of multiplication or propagation (art. 130, last para.);

(g) In the public interest and in particular for reasons of national emergency, public health, national security or non-commercial public use, or in order to correct an anti-competitive practice, the Registry may stipulate the following at any time, at the request of the authority or an interested person and after hearing the person concerned: (i) that the invention that has been patented or in respect of which a patent has been applied for shall be used for industrial or business purposes by a State agency or by one or more public or private legal entities designated for that purpose; or (ii) that the invention that has been patented or in respect of which a patent has been applied for shall remain open to the granting of one or more obligatory licences, in which case the competent national authority may grant a licence to anyone who requests one, subject to the conditions established (art. 134).

19. In the area of copyright, the Law on Copyright and Related Rights stipulates:

(a) Works protected by this Law may be communicated lawfully, without the authority of the author or payment of any remuneration being necessary, where the communication: (i) occurs in an exclusively domestic environment, provided that no direct or indirect economic interest exists and that the communication is not deliberately disseminated outside by any means, either entirely or in part; (ii) is made for exclusively educational purposes in the course of the activities of a teaching institution by the staff and students of the said institution, provided that the communication has no direct or indirect profit-making purpose and the public consists solely of the staff and students of the institution or parents or tutors of students and other persons directly connected with its activities and (iii) is essential for the conduct of a legal or administrative proceeding (art. 63);

(b) With regard to works already disclosed, the following is likewise permitted without the authority of the author: (i) the reproduction by reprographic means of articles or short excerpts from lawfully published works for teaching or the holding of examinations at educational institutions, provided that there is no profit-making purpose and the use does not interfere with the normal exploitation of the work or prejudice the legitimate interests of the

author; (ii) the individual reproduction of a work by a non-profit-making library or archive where the copy is in its permanent collection, for the purpose of preserving the said copy and replacing it in case of need, or alternatively for the replacement of a similar copy in the permanent collection of another library or archive where that copy has been mislaid, destroyed or rendered unusable, provided that it is not possible to acquire the copy in a reasonable time, or on reasonable terms; (iii) the reproduction of a work for the purpose of judicial or administrative proceedings and (iv) the reproduction of a work of art on permanent display in a public place, or on the outer wall of a building, such reproduction being done in a medium different from that used for the making of the original, provided that the name of the author, if known, the title of the work, if available, and the place in which it is located are specified (art. 64);

(c) It shall be permissible for the lawful copy of a work expressed in writing to be lent to the public by a library or archive whose activities have no direct or indirect profit-making purpose (art. 65);

(d) It shall be lawful, without the authorization of the owner of the rights and without payment of remuneration, on condition that the source and the name of the author of the work used, if given, are mentioned: (i) to reproduce and distribute information, news and topical articles in the press, or disseminate them by broadcasting or cable distribution, provided that such reproduction, broadcasting or transmission to the public has not been expressly reserved; (ii) to reproduce and make available to the public in connection with information on current events, by means of photography, videograms, broadcasting or cable transmission, fragments of works seen or heard in the course of the said events, to the extent justified by the informatory purpose; (iii) to make use, by any means of communication to the public, for the purposes of imparting information on current events, of political or judicial speeches, dissertations, addresses, sermons and other similar works delivered in public, provided that the authors thereof shall retain the exclusive right to publish them for other purposes; (iv) to include in one's own work fragments of the works of others in written, audio or audiovisual form, and also three-dimensional, photographic and other similar works, provided that the said works have already been disclosed and that they are included by way of quotation or for analysis in connection with teaching or research (art. 66);

(e) Lectures or courses given at teaching establishments may be freely annotated and collected, but their publication or reproduction, whether total or partial, is prohibited without the written authority of the person who delivered them (art. 67);

(f) The publication of laws, decrees, regulations, ordinances, agreements, resolutions and the decisions of courts and administrative bodies, and also official translations of such texts, may be done freely insofar as the official publication is adhered to (art. 68);

(g) The publication of the portrait or photograph of a person shall be free only for information, scientific, cultural or teaching purposes or where it is connected with events or circumstances in the public or social interest, provided that the prestige or reputation of the person is not thereby diminished and that the publication is not contrary to morality or proper practice (art. 69);

(h) The performance of phonograms and the receiving of radio or television broadcasts shall be lawful where it is done for the purposes of demonstration to customers in business establishments that display and sell receiving, reproduction or other similar apparatus or audio or audiovisual media that embody the works used (art. 70);

(i) Broadcasting organizations may, without the authority of the author or payment of special remuneration, make ephemeral recordings of a work that they have the right to broadcast, using their own equipment and for use in their own broadcasts. Nevertheless, the broadcasting organization shall destroy the recording within a period of six months from its making, except where a longer period has been agreed with the author. The recording may be preserved in official archives where it possesses exceptional documentary character (art. 71).

IV. Protection of traditional knowledge, indigenous cultural values, folklore and access to biological diversity

20. The intellectual property regime of Guatemala contains no provisions governing the protection of traditional knowledge, indigenous cultural values, folklore and access to biological diversity, but draft legislation in this area is expected to be enacted shortly.

21. There are, however, other legal provisions which lay down regulations for certain aspects relating to those areas.

22. The Constitution of the Republic lays down the following basic norms:

(a) The right of persons and communities to their cultural identity, in accordance with their values, their language and their customs, is recognized (art. 58);

(b) National artistic expression, popular art, folklore and indigenous handicrafts and industries, must be given special protection by the State in order to preserve their authenticity. The State shall foster the opening of national and international markets in order to ensure a free market for the work of artists and handicraft workers, and it shall promote their training and professional and financial advancement (art. 63);

(c) The conservation, protection and improvement of the natural heritage of the Nation is declared to be in the national interest. The State shall encourage the establishment of national parks and nature reserves and sanctuaries, which shall be inalienable. A law shall guarantee their protection and the protection of the fauna and flora they contain (art. 64);

(d) Guatemala is made up of different ethnic groups, including indigenous groups of Mayan ancestry. The State recognizes, respects and promotes their ways of life, customs, traditions and forms of society, the wearing of indigenous costumes by men and women, languages and dialects (art. 66). In this connection, the Law on Copyright and Related Rights, Decree No. 33-98, stipulates that expressions of folklore belong to the cultural heritage of the country and shall be provided for in specific legislation (art. 14);

(e) The State, the municipalities and the inhabitants of the national territory shall be obliged to foster social, economic and technological development aimed at preventing contamination of the environment and maintaining ecological equilibrium. The necessary standards should be laid down to ensure that the fauna, flora, land and waters are used and developed rationally and not plundered (art. 97);

23. The following instruments are also in force in Guatemala:

(a) Law on the Protection and Improvement of the Environment (Decree No. 68-86 of the Congress of the Republic), which aims at ensuring ecological equilibrium and the quality of the environment to improve the quality of life of the country's inhabitants. Its specific objectives are: the protection, conservation and improvement of natural resources; restoration of the environment and prevention of its misuse; prevention, regulation and control of causes of environmental deterioration and contamination of ecological systems; design of educational, environmental and cultural systems; environmental policy design; promotion of appropriate technologies, etc.;

(b) Law on Protected Areas (Decree No. 4-89 of the Congress of the Republic). This law was promulgated for two specific purposes: (i) introduction of regulations for the use, handling and conservation of the country's wildlife resources; (ii) establishment of the Guatemalan System for Protected Areas;

(c) Decree No. 20-76, establishing the Exclusive Economic Area, and the Law on Animal Health (Decree No. 463 of the Congress of the Republic) represent ordinary legislation applicable to this field.

24. Similarly, the Convention on Biological Diversity was adopted on 21 February 1995 by Decree No. 5-95 of the Congress of the Republic, ratified on 14 June 1995, and its instrument of ratification deposited with the United Nations on 10 July 1995. The objectives of the Convention, which was elaborated at the Earth Summit held in Rio de Janeiro in June 1992, are the conservation of biological diversity, the sustainable use of resources and the sharing of the benefits arising out of their use.

25. The Peace Agreements contain provisions relating to the environment, natural resources and sustainable development, including the following:

(a) Indigenous communities are recognized as having the right to their traditional practices with regard to the use of natural resources;

(b) The use of customary law in indigenous communities for managing their internal affairs, principally as regards their natural heritage, is validated and tacitly accepted;

(c) The Guatemalan nation is defined and characterized as being of national unity, multi-ethnic, multicultural and multilingual;

(d) Provision is made for economic and social policies to be designed and implemented, based on sustainability, to achieve an increase in the country's total productivity (with special emphasis on the areas of ecotourism, forestry and fishery resources) for the sectors of the population which are currently in a situation of poverty.

B. Mexico

[Original: Spanish]

1. The Convention on Biological Diversity is an example of progress in international law in the establishment of norms of protection to address the new problems arising from technological advances and developments in natural resource exploitation.

2. Trends in human rights have led to a movement for the recognition of the collective rights of indigenous peoples and communities, and they in turn have demanded rights over the natural resources in their territories.

3. Indigenous peoples have a relationship of respect and care with natural resources, and they have developed a wealth of traditional knowledge. As a result, their territories are ones of great biological diversity.

4. Indigenous peoples and communities did not consider it necessary to patent or register such knowledge, resources or practices. On becoming aware of the many forms of appropriation of their territories, including their traditional knowledge, they have demanded that their territories and knowledge be respected and that they themselves be taken into account in the elaboration of rules for the protection of their own technologies.

5. With regard to intellectual property and human rights, it should be noted that States do not recognize indigenous peoples as having rights that are a priori inalienable, hence as parties to the Convention on Biological Diversity. Thus there is no recognition of the relationship between indigenous peoples' lands and territories, their knowledge and biodiversity.

6. Despite the fact that indigenous peoples are recognized by the Convention, it establishes no mechanisms for their participation. Similarly, the Convention does not attach importance to action to combat biopiracy or indigenous peoples' lack of control over the genetic resources in their lands and territories, including marine areas. Finally, it shows obvious favouritism for current international, multilateral, bilateral and national legal frameworks, including intellectual property regimes and their impact on indigenous knowledge, and fails to connect article 8 (j) and others to various international instruments dealing with indigenous rights.

7. The Instituto Nacional Indigenista proposes the following in order to give effect to resolution 2000/7:

(a) Elaboration of mechanisms to ensure the effective participation by indigenous peoples in the implementation of article 8 (j) of the Convention on Biological Diversity and related articles through the following:

(i) Recognition of indigenous peoples as parties to the Convention;

(ii) Adoption of the recommendation of the second international indigenous forum regarding the establishment of a working group on indigenous populations;

(iii) Involvement of indigenous peoples in the interpretation of article 8 (j) and related articles, including legislative reforms in this area, environmental plans of action and impact studies;

(iv) As a matter of urgency, promotion of the right to prior informed consent in all mechanisms designed to ensure participation by indigenous peoples;

(b) Development of mechanisms and processes to ensure indigenous peoples' control over their lands and territories for the protection and improvement of their biodiversity;

(i) Recognition of the a priori inalienable rights of indigenous peoples;

(ii) Recognition of the relationship between indigenous peoples' territories and lands and their knowledge, innovations and practices in relation to biodiversity;

(iii) Recognition of their right to demarcate their lands and territories;

(c) Development of mechanisms for ensuring the participation of indigenous peoples in the process of incorporating the sustainable use of their resources, procedures and practices, provided they have first given their informed consent, into development plans, policies and processes at national and international level, with special attention to cross-border topics of importance to indigenous people;

(d) Elaboration of practices for the prevention of biopiracy, monitoring of bioprospection and access to genetic resources;

(i) Moratorium on all bioprospecting and/or collection of biological material in indigenous peoples' territories and in protected areas, as well as the issuance of patents based on such collection, until such time as a system of protection is established;

(ii) Recognition of indigenous people's rights to access to and repatriation of genetic material held in all ex situ collections, such as gene banks, herbalist shops and botanical gardens;

(e) Distribution of the benefits deriving from the use of indigenous knowledge in accordance with other rights, obligations and responsibilities, such as land rights and the right of indigenous people to manage their own culture, in order to facilitate the transmission of knowledge, innovations, practices and values to future generations.

II. REPLIES RECEIVED FROM INTERNATIONAL ORGANIZATIONS

World Intellectual Property Organization

1. WIPO believes that both the human rights and the intellectual property communities would be best served by a technical and accurate analysis of the relationship between intellectual property rights and human rights which refers to specific cases. WIPO remains willing to contribute its expertise on intellectual property to discussions of this nature.

2. The relationship between intellectual property and human rights has received little attention. It was in recognition of this that WIPO, in cooperation with OHCHR, organized the successful panel discussion on intellectual property and human rights on 9 November 1998.

3. Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects both the human right of authors to benefit from the moral and material interests resulting from their literary, artistic and scientific productions, and the human right of the public to have access to productions protected by the author's rights. The two rights are formulated and juxtaposed in a similar way in the Universal Declaration.

4. The right to the use and dissemination of information - the freedom "to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits" - and the right to protect the creators of information - the "moral and material interests resulting from any scientific, literary or artistic production of which he is the author" - may at once be both complementary and competing. Realization of the former rights may depend upon the promotion and protection of the latter rights; on the other hand, exercise of the latter rights may, in certain circumstances, appear to hinder or frustrate realization of the former rights.

5. The tension is, however, the antechamber to a larger debate on the relationship between IP and the realization and promotion of other human rights in ICESCR and the Universal Declaration, such as the rights to health, adequate food and education, as well as the right to development.

6. Resolving tensions and striking balances is, however, not unfamiliar to the IP system. All IP rights are subject to various exceptions and limitations, and in some cases compulsory (non-voluntary) licences, tools which can be used to strike the right balance between the rights of creators and those of users. These limitations can resolve tensions internal to intellectual property and external to other systems - such as human rights.

7. International IP standards provide for legal measures that may be adopted in national laws to balance the rights and interests of rights-holders and the public. These measures permit national authorities to craft their IP laws in line with their respective economic, social, technological and cultural developmental goals.

8. For example, in the field of patents, these measures enable national laws to exclude from patentability what would otherwise be patentable subject matter or to restrict patent rights, on grounds such as the protection of human, animal or plant life and health, prejudice to the environment, morality and the ordre public.*

9. More generally, article 8 of the TRIPS Agreement provides that:

> "1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
>
> "2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."

10. In addition, national laws can authorize compulsory licensing under certain conditions (as set out in article 31 of the TRIPS Agreement) and measures can be adopted to control anti-competitive practices in contractual licenses (see article 40 of the TRIPS Agreement).

11. However, these are enabling provisions only, and their precise scope, meaning and effect in practice are subject to the interpretation and implementation of national lawmakers.

12. The possibilities created by the provisions are not, however, unlimited and should not be interpreted so broadly as to negate the underlying fundamental goals and advantages of the IP system. The patent system, for example, encourages people to invent. Granting exclusive rights to an invention for a limited period of time, in particular to those engaged in commercial enterprises, encourages them to invest the resources necessary to make and commercialize the inventions. The patent system also encourages people to disclose inventions, rather than retain them as trade secrets. It should also be borne in mind that new inventions, by definition, do not take away from the public what the public already had. Inventions have to be new, which means different from what existed before.

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* See, for example, article 27 (2) of the TRIPS Agreement, "Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law."

13. Similarly, in the field of copyright, national legislators may take advantage of certain exceptions and limitations which are, however, not designed to undermine the fundamental principles of the copyright system.

14. All human rights are interdependent and indivisible. The Vienna Declaration and Programme of Action (1993) adopted at the World Conference on Human Rights notes that "(a)ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally and in a fair and equal manner, on the same footing and with the same emphasis".

15. Tensions between various human rights are not uncommon and balances must be struck all the time. For example, tensions between the right to freedom of speech and the right to privacy and to dignity are well known.

16. Thus, IP laws do not vest authors and inventors with absolute and unrestricted rights, as is sometimes suggested. For example, resolution 2000/7 adopted by the Sub-Commission on the Promotion and Protection of Human Rights on 17 August 2000 affirms that IP is a human right "subject to limitations in the public interest". Such statements appear to pass over the complementarity of interests that authors/inventors and the wider public have in an IP system and the system's built-in limitations, exceptions to the system and the tools that can be used to find the right balance.

17. Of course, there may always be legitimate disagreements over what constitutes the "right balance". What constitutes the right balance depends largely upon one's perspective. Just as with a conflict that may exist between, for example, the rights to freedom of speech and to privacy, there is often no single right answer, but as many perspectives as there are affected constituencies. Implicit within the notion of "balance" is a compromise in which as many competing interests as possible are satisfied as far as possible. The IP system allows lawmakers certain flexibilities and options to meet their respective developmental goals, and in so doing the opportunity to strike the right balance.

III. REPLIES RECEIVED FROM NON-GOVERNMENTAL ORGANIZATIONS

A. British Copyright Council

1. The British Copyright Council is an association of bodies representing those who create, or hold interests or rights in literary, dramatic, musical and artistic works, and those who give performances, or hold rights or interests in performances, being works and performances in which rights subsist under the United Kingdom Copyright Designs and Patents Act (1988) as amended.

2. The British Copyright Council supports the resolution in principle but would emphasize three matters.

3. The first refers to the relationship between intellectual property and industrial property. At one time, industrial property (patents, designs, trademarks and so on) and copyright (intellectual property) tended to be treated separately. Industrial property came

under the umbrella of the Paris Convention (1883) as revised and copyright under the Berne Convention (1986) as revised. The underlying justifications for these types of right differed in some respects, as indeed did the rationales for different types of industrial property, for example as between patents and trademarks. Today, it is much more common for the term intellectual property to be used generically to cover all rights in this area. For example, the Trade-Related Aspects of Intellectual Property Agreement (TRIPS) covers virtually all areas of intellectual property, and indeed the generic term is not used by the World Intellectual Property Organization, which is responsible for much of the international developments in intellectual property. However, it must be borne in mind that, whilst there may be some conceptual similarities between the different branches of intellectual property, there are also important differences. It does not necessarily follow, in human rights matters as in other areas, that the approach should always be the same. Thus, any evaluations of patents or trademarks do not automatically or necessarily apply to copyright.

4. The second issue relates to the balance between copyright as a property rights and the protection of the public interest. Creators of copyright works and related subject matter have rights which are recognized and guaranteed by article 27 of the Universal Declaration on Human Rights. They are fundamental private property rights. However, they are not absolute: there are various control mechanisms built into this area of law to ensure that an appropriate balance is maintained between private property and the public interest, for example, to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancements and its benefits, as identified in article 27 (1) of the Universal Declaration.

5. Thus, the scope of copyright protection is limited and does not provide control over the ideas, information or concepts expressed in such works. Further, all jurisdictions have various built-in public interest exceptions and limitations permitting some uses of works without consent.

6. However, limitations upon the private property rights of creators cannot go too far without undermining the very essence of the property rights. Many international conventions, alive to the need to ensure that the balance does not tilt unfairly against authors, performers and related right-holders, thereby, in effect, resulting in the expropriation of fundamental private property rights, now contain a so-called three-step test. For example, article 13 of the TRIPS Agreement provides that member States shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right-holder.

7. Thus, while in general, copyright comprises a set of exclusive rights, there are opportunities to modify them by, on occasion, allowing free use of copyright works, or use in exchange for fair compensation; but all such modifications are subject to the three-step test. This has been the approach taken, for example, in the recently adopted European Directive on Copyright and Related Rights in the Information Society (May 2001).

8. It may be that the exceptions and limitations to exclusive private property rights of copyright holders, within the terms of the three-step test, do not always satisfy the needs of those in developing countries, for example, who require access to works for education, research or similar purposes but cannot afford to meet the legitimate royalties required for their use. The

solution to this difficulty cannot be to expropriate the private property rights of creators of such material in breach of article 27 (2). Rather, it must be a matter for Governments to determine whether and how they can provide economic assistance so that copyright works can be made available in those societies. There is an important distinction between the human rights implications of expropriating private property for desirable social purposes and of protecting such rights, but providing those who seek to use such works, from whatever source, with the means of paying for them.

9. The third issue relates to the situation where copyright is not given adequate protection. The rights of creators, as recognized in article 27 (2) of the Universal Declaration, are still in need of full legislative recognition, practical application and enforcement in many jurisdictions, including those which make the greatest use of the works of creators. Many creators passionately believe their moral rights in their creations to be as important, if not more important, than their economic (material) rights. However, moral rights are still not expressly provided for in some countries. Where there is express provision, the rights are sometimes inadequately expressed or are limited in scope. There are also too many opportunities for those exploiting the works of creators to nullify or minimize the moral rights protection provided for in legislation by the use of general waiver provisions and other devices. Today, in our digital society, the opportunities to interfere with and distort the works of authors and performers are greater than ever before (as implicitly acknowledged by article 5 of the WIPO Performances and Phonograms Treaty, 1996). It is increasingly important to ensure that moral rights are effectively protected and to limit the opportunities for those using the works of creators to unreasonably avoid their application.

B. Quaker United Nations Office/Friends World Committee for Consultation

1. Intellectual property rights should not be considered as human rights. Rather they are instruments used by societies to achieve social and economic goals. They may indeed be a means - but not the only means or necessarily the best means - of fulfilling the obligations of article 27 of the Universal Declaration to reward human creativity. The means of fulfilling human rights obligations should not be confused with the human rights themselves. Indeed, there is considerable debate about how different IPRs and the way they are implemented affect a wide range of human rights referred to in other articles of the Universal Declaration.

2. Moreover, it seems that human rights should apply to natural persons, not legal persons. IPRs are private rights, under TRIPS, which may be exercised or held by natural or legal persons. According to various inputs we have had in our work, IPRs are increasingly used by corporate bodies as part of their asset portfolio and investment protection mechanisms - not as a means of supporting human rights. Indeed, it might be helpful to re-think the language used to describe IPRs and call them instead intellectual property privileges, which is what they are, and thus remove the possible confusion with human rights.